

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,)	
)	
Plaintiff-Appellee,)	
)	
v.)	Supreme Court 17-0395
)	
SEAN DAVID GORDON,)	
)	
Defendant-Appellant.)	

APPEAL FROM THE IOWA DISTRICT COURT
FOR FLOYD COUNTY
HONORABLE DEDRA SCHROEDER, JUDGE

APPELLANT'S BRIEF AND ARGUMENT
AND
REQUEST FOR ORAL ARGUMENT

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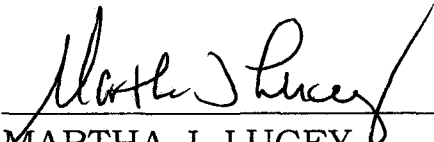
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CERTIFICATE OF SERVICE

On the 19th day of October, 2017, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Sean Gordon, # 6185035, Newton Correctional Facility, 307 South 60th Avenue, West, P.O. Box 218, Newton, IA 50208.

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. WHETHER THE DISTRICT COURT VIOLATED GORDON'S DUE PROCESS RIGHTS BY CONSIDERATION OF AND RELIANCE ON THE SEX OFFENDER RISK ASSESSMENTS IN IMPOSING SENTENCE?

Authorities

State v. Clark, 814 N.W.2d 551, 560 (Iowa 2012)

State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994)

State v. Ashley, 462 N.W.2d 279, 281 (Iowa 1990)

State v. Delano, 161 N.W.2d 66, 72 (Iowa 1968)

Kent v. United States, 383 U.S. 541, 562, 86 S.Ct. 1045, 1057 (1966)

State v. Drake, 259 N.W.2d 862, 867 (Iowa 1977)

State v. Kaster, 469 N.W.2d 671, 673 (Iowa 1991)

Iowa Code § 901.2 (2017)

Iowa Code § 901.3 (2017)

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Townsend v. Burke, 334 U.S. 736, 741, 68 S.Ct. 1252, 1255 (1948)

In re Detention of Holtz, 653 N.W.2d 613 (Iowa 2002)

Malenchik v. State, 928 N.E.2d 564, 568 (Ind. 2010)

State v. Loomis, No. 2015AP157-CR, 2015 WL 5446731, at *1 (Wis. Ct. App. Sept. 17, 2015)

State v. Loomis, 881 N.W.2d 749, 752-56 (Wis. 2016)

Loomis v. Wisconsin, ___ S.Ct. ___, No. 16-6387, 2017 WL 2722441 (June 26, 2017)

Cecelia Klingele, *The Promises and Perils of Evidence-Based Corrections*, 91 Notre Dame L. Rev. 537, 576 (2015)

Pamela M. Casey et al., National Center for State Courts (NCSC), Using Offender Risk and Needs Assessment Information at Sentencing: Guidance for Courts from a National Working Group (2011)

<http://www.ncsc.org/Services-and-Experts/~media/Files/PDF/Services%20and%20Experts/Areas%20of%20expertise/Sentencing%20Probation/RNA%20Guide%20Final.ashx>

U.S. Const. amend. XIV

Iowa Const. art. I, § 9

Sex Offender Treatment Intervention and Progress Scale (SOTIPS) Manual

<http://www.csom.org/pubs/SOTIPSMANUALOctober2013.pdf>

II. DID THE DISTRICT COURT ABUSE ITS DISCRETION IN RELYING ON IMPERMISSIBLE FACTORS IN IMPOSING SENTENCE?

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State v. Sailer, 587 N.W.2d 756, 762 (Iowa 1998)

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III. DID TRIAL COUNSEL PROVIDE INEFFECTIVE ASSISTANCE?

Authorities

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Iowa Const. art. I, § 10

Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063 (1984)

Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981)

Devoss v. State, 648 N.W.2d 56, 60-61 (Iowa 2002)

State v. Hrbek, 336 N.W.2d 431, 435-436 (Iowa 1983)

State v. Stelzer, 288 N.W.2d 557, 560 (Iowa 1980)

1. Trial counsel provided ineffective assistance by failing to object to PSI which included the Chickasaw County pending charge and surrounding circumstances.

Authorities

State v. Witham, 583 N.W.2d 677, 678 (Iowa 1998)

State v. Gonzalez, 582 N.W.2d 515, 517 (Iowa 1998)

State v. Townsend, 238 N.W.2d 351, 358 (Iowa 1976)

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2. If error was not preserved in Division I, trial counsel provided ineffective assistance by failing to challenge the sentencing procedure and sentence imposed which violated Gordon's constitutional right to due process.

Authorities

State v. Vance, 790 N.W.2d 775, 789 (Iowa 2010)

http://sentencing.typepad.com/sentencing_law_and_policy/2015/09/wisconsin-appeals-court-urges-states-top-court-to-review-use-of-risk-assessment-software-at-sentencing.html

http://sentencing.typepad.com/sentencing_law_and_policy/2016/07/wisconsin-supreme-court-rejects-due-process-challenge-to-use-of-risk-assessment-instrument-at-sentencing.html

<http://www.scotusblog.com/case-files/cases/loomis-v-wisconsin/>

State v. Westeen, 591 N.W.2d 203, 210 (Iowa 1999)

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ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because an issue raised involves a substantial issue of first impression in Iowa and presents a substantial question of enunciating or changing legal principles. Iowa R. App. P. 6.903(2)(d), 6.1101(2)(c), and 6.1101(2)(f). Specifically, Gordon requests this Court adopt guidelines for use of actuarial risk assessment instruments in sentencing proceeding to comply with due process.

STATEMENT OF THE CASE

Nature of the Case: Appellant Sean Gordon appeals following his guilty plea, judgment and sentence, to the charge of sexual abuse in the third degree in violation of Iowa Code section 709.4(1)(b)(3)(d) (2015).

Course of Proceeding and Disposition Below: On October 31, 2016, the State charged Gordon with sexual abuse in the third degree for acts alleged in June 2016. (TI) (App. pp. 4-5). On January 3, 2017, the district court scheduled a

guilty plea hearing. (Order Setting Plea Change)(App. pp. 6-7).

Gordon submitted a written guilty plea on January 4, 2017. (GP)(App. pp. 8-11). He also pleaded guilty as charged in open court on January 4, 2017. (Record of Plea Change)(App. pp. 12-13).

A Presentence Investigation Report was filed on March 6, 2017. (PSI)(Conf. App. pp. 37-49). The PSI included a Psychosexual Assessment Report. (Report)(Conf. App. pp. 50-60).

On March 13, 2017, Gordon was sentenced. The court ordered Gordon to be incarcerated for a term not to exceed ten years. The court also ordered Gordon placed on lifetime parole supervision pursuant to Iowa Code section 903B.1 upon discharge of his criminal sentence. (Sent. Tr. p. 16L21-p. 18L8; Judgment)(App. pp. 14-17). Notice of Appeal was filed on March 13, 2017. (Notice) (App. p. 18).

Facts: Gordon admitted that in June 2016, he performed a sex act with AG who was fourteen or fifteen years

old. Gordon was four or more years older than AG. (GP ¶9; Plea Tr. p. 9L4-16)(App. p. 8). See also Attachment to Minutes (Conf. App. pp. 9-34).

ARGUMENT

I. THE DISTRICT COURT VIOLATED GORDON'S DUE PROCESS RIGHTS BY CONSIDERATION OF AND RELIANCE ON THE SEX OFFENDER RISK ASSESSMENTS IN IMPOSING SENTENCE.

Standard of Review.

A violation of a constitutional right to due process is reviewed de novo. State v. Clark, 814 N.W.2d 551, 560 (Iowa 2012).

Preservation of Error.

The general rule of error preservation is not applicable to void, illegal or procedurally defective sentences. State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994) (Improper reliance on parole policies in fashioning sentence).

Discussion.

The Iowa Supreme Court has stated that sentencing hearings need not “conform with all of the requirements of a

criminal or even of the usual administrative hearing; but ... *the hearing must measure up to the essentials of due process and fair treatment.*" State v. Ashley, 462 N.W.2d 279, 281 (Iowa 1990) (quoting State v. Delano, 161 N.W.2d 66, 72 (Iowa 1968)). See also Kent v. United States, 383 U.S. 541, 562, 86 S.Ct. 1045, 1057 (1966). The Court discussed the process to which a defendant is due at sentencing:

Although not identified by this court as a due process concept, we distilled the essence of required fundamental fairness in these circumstances when we said:

"A judgment in a criminal case will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play."

State v. Drake, 259 N.W.2d 862, 867 (Iowa 1977), abrogated by State v. Kaster, 469 N.W.2d 671, 673 (Iowa 1991).

Iowa Code sections 901.2 through 901.4 reflect the legislature's concern for orderly presentation of information to the court for sentencing purposes and the fundamental notion of fairness. Under section 901.2, the State is required to provide the court with "any information which may be offered which is relevant to the question of sentencing." Under section 901.4, the court must in turn make available to

defense counsel all of the presentence investigation information at least three days prior to the date set for sentencing.

State v. Ashley, 462 N.W.2d at 281. See also Iowa Code §901.2 (2017) (Presentence Investigation); §901.3 (2017) (Presentence Investigation Report); §901.4 (2017) (Presentence investigation report confidential — access); §901.5 (2017) (Pronouncing judgment and sentence).

A defendant has a constitutionally due process right to be sentenced on accurate information. Townsend v. Burke, 334 U.S. 736, 741, 68 S.Ct. 1252, 1255 (1948) (“this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with due process of law, and such conviction cannot stand.”).

In imposing sentencing, the district court stated:

I have concerns that you're all over the board with whether you think this offense was committed by you or not. I was here for your guilty plea, and you admitted the offense. You denied it throughout the presentence investigation report. Apparently, denied it to your folks or said that they didn't believe it had occurred. And today you're telling me you did have a sexual

relationship with this gal. So you're kind of all over the board with this. What that means to me is not so much, gosh, you've been dishonest, but it's -- it's how amenable I think you are to treatment.

I also have concerns about the continued high-risk behavior being in -- being with a juvenile female who obviously has got other issues going on, and a possession of methamphetamine floating around there also. I get that it's not a conviction, and I distinguish that, and I understand that, but I look at a person's behavior after they've been charged with something like this and if that's a wake-up call to them.

I look at our necessity for protecting the community, which obviously ties into some of the other comments I made. And I look at how this outcome is going to deter you from future offenses or is going to deter other people in the community from committing these type of offenses.

You've got a long history of drug abuse, and I get that this isn't a drug crime. But you've freely said, When I use methamphetamine, I'm less sexually inhibited, and I think more about sex, and I use it purposefully to enhance my sexual activity. So those things in that fashion are tied together.

In looking at your psychosexual evaluation, I note that on the STATIC-99R score, which was a risk level score, you were given a Level III, average risk. On the SOTIPS score, you were given a high risk assessment, placed in a high-risk category. And what that sex offender treatment intervention progress scale is supposed to tell me is your supervision needs, your progress -- basically, what progress we can anticipate through treatment, taking responsibility, looks at a lot of different factors. And that places you as high risk. Treatment amenability is based upon looking at your willingness to admit your behavior and

take responsibility and the level of risk you pose to the community.

All of these things, in looking at it, tell me that an appropriate sentence in this matter would sentence you up to ten years in the Iowa state prison system with the Iowa Department of Correctional Services, having that sentence not be suspended, and having you be transported to the Iowa Medical and Classification Center at Oakdale.

(Sent. Tr. p. 15L4-p. 17L1).

This Court has not yet addressed the proper use of risk assessment tools in sentencing.¹ Decisions from the Indiana Supreme Court and the Wisconsin Supreme Court are instructive.

The Indiana Supreme Court considered whether and in what manner may a judge consider the results of the LSI-R, SASSI, or other similar assessment tools. Malenchik v. State, 928 N.E.2d 564, 568 (Ind. 2010). The assessment tools at

¹ This Court has addressed the admissibility of the STATIC-99, the first generation tool. In re Detention of Holtz, 653 N.W.2d 613 (Iowa 2002). The Court found no error in the admission of the actuarial risk assessment tool based on the record as a whole. The experts acknowledged the limitations of the risk assessment tool and used it in conjunction with a full clinical evaluation. Id. at 617-620.

issue, LSI-R and SASSI, were “third generation” tools. Id.

570. The Indiana Court examined the instruments and explanations of intended use.

While there may be strong statistical correlation of assessment results and the risk or probability of recidivism, the administrator’s evaluation as to each question may not coincide with that of the trial judge’s evaluation based on the information presented at sentencing. The nature of the LSI-R is not to function as a basis for finding aggravating circumstances, nor does an LSI-R score constitute such a circumstance. But LSI-R scores are highly useful and important for trial courts to consider as a broad statistical tool to supplement and inform the judge’s evaluation of information and sentencing formulation in individual cases. The LSI-R manual directs that it is not “to be used as a substitute for sound judgment that utilizes various sources of information.” Significantly, the manual explicitly declares: “This instrument is not a comprehensive survey of mitigating and aggravating factors relevant to criminal sanctioning and was never designed to assist in establishing the just penalty.”

Id. at 572 (other citations omitted).

The SASSI instrument scores provide information regarding the “severity of substance dependence, substance abuse, acknowledged substance misuse, the possible need for supervised detoxification, level of acknowledgement, emotional pain, risk of criminal behavior, and focus on others rather than self.” The SASSI Institute describes the information provided by the scores as providing “clinical information that can be of value in identifying treatment issues and in developing effective treatment plans.” But the SASSI is not designed to diagnosis a substance abuse disorder. It only

seeks to identify persons with a high probability for substance dependence.

Id. (other citations omitted).

It is clear that neither the LSI-R nor the SASSI are intended nor recommended to substitute for the judicial function of determining the length of sentence appropriate for each offender. But such evidence-based assessment instruments can be significant sources of valuable information for judicial consideration in deciding whether to suspend all or part of a sentence, how to design a probation program for the offender, whether to assign an offender to alternative treatment facilities or programs, and other such corollary sentencing matters. The scores do not in themselves constitute an aggravating or mitigating circumstance because neither the data selection and evaluations upon which a probation officer or other administrator's assessment is made nor the resulting scores are necessarily congruent with a sentencing judge's findings and conclusion regarding relevant sentencing factors. Having been determined to be statistically valid, reliable, and effective in forecasting recidivism, the assessment tool scores may, and if possible should, be considered to supplement and enhance a judge's evaluation, weighing, and application of the other sentencing evidence in the formulation of an individualized sentencing program appropriate for each defendant.

Id. at 573. The Indiana Supreme Court held that legitimate offender assessment instruments do not replace but may inform a trial court's sentencing determinations. The court affirmed the sentence because the trial court's consideration of the defendant's assessment model scores was only

supplemental to other sentencing evidence that independently supported the sentence imposed. Malenchik v. State, 928 N.E.2d 564, 566 (Ind. 2010).

The Wisconsin Court of Appeals certified an “appeal to the Wisconsin Supreme Court to decide whether the right to due process prohibits circuit courts from relying on COMPAS assessments when imposing sentence.” More specifically, the Court of Appeals certified “whether this practice violates a defendant’s right to due process, either because the proprietary nature of COMPAS prevents defendants from challenging the COMPAS assessment’s scientific validity, or because COMPAS assessments take gender into account. Given the widespread use of COMPAS assessments, we believe that prompt supreme court review of the matter is needed.” State v. Loomis, No. 2015AP157-CR, 2015 WL 5446731, at *1 (Wis. Ct. App. Sept. 17, 2015).

The Wisconsin Supreme Court reviewed the pros and cons of evidence-based sentencing. State v. Loomis, 881

N.W.2d 749, 752-56 (Wis. 2016), cert. denied Loomis v.

Wisconsin, ___ S.Ct. ___, No. 16-6387, 2017 WL 2722441

(June 26, 2017). The Wisconsin Court stated:

But other voices are challenging the efficacy of evidence-based sentencing and raise concern about overselling the results. They urge that judges be made aware of the limitations of risk assessment tools, lest they be misused:

In the main, [supporters] have been reticent to acknowledge the paucity of reliable evidence that now exists, and the limits of the interventions about which we do possess evidence. Unless criminal justice system actors are made fully aware of the limits of the tools they are being asked to implement, they are likely to misuse them.

Cecelia Klingele, *The Promises and Perils of Evidence-Based Corrections*, 91 Notre Dame L. Rev. 537, 576 (2015).

We heed this admonition. The DOC already recognizes limitations on the PSI, instructing that “[i]t is very important to remember that risk scores are not intended to determine the severity of the sentence or whether an offender is incarcerated.” We are in accord with these limitations. Further, we set forth the corollary limitation that risk scores may not be considered as the determinative factor in deciding whether the offender can be supervised safely and effectively in the community.

Id. at 759-60.

The Loomis Court, focusing exclusively on the use of the risk assessment tool at sentencing and considering the

expressed due process arguments regarding accuracy, determined that use of a COMPAS risk assessment must be subject to certain cautions in addition to the limitations set forth. Loomis, 881 N.W.2d at 763. The Court held:

Specifically, any PSI containing a COMPAS risk assessment must inform the sentencing court about the following cautions regarding a COMPAS risk assessment's accuracy: (1) the proprietary nature of COMPAS has been invoked to prevent disclosure of information relating to how factors are weighed or how risk scores are to be determined; (2) risk assessment compares defendants to a national sample, but no cross-validation study for a Wisconsin population has yet been completed; (3) some studies of COMPAS risk assessment scores have raised questions about whether they disproportionately classify minority offenders as having a higher risk of recidivism; and (4) risk assessment tools must be constantly monitored and re-normed for accuracy due to changing populations and subpopulations. Providing information to sentencing courts on the limitations and cautions attendant with the use of COMPAS risk assessments will enable courts to better assess the accuracy of the assessment and the appropriate weight to be given to the risk score.

Id. at 763-64.

The Court addressed Loomis' complaint the use of the COMPAS instrument raised a due process concern because COMPAS is based on group data and the defendant is to

receive an individualized sentence. Loomis, 881 N.W.2d at 764. The COMPAS Practitioner’s Guide explained “that “[r]isk assessment is about predicting group behavior ... it is not about prediction at the individual level.” Risk scales are able to identify groups of high-risk offenders—not a particular high-risk individual.” Id. The Wisconsin DOC explained that “staff are predicted to disagree with an actuarial risk assessment (e.g. COMPAS) in about 10% of the cases due to mitigating or aggravating circumstances to which the assessment is not sensitive.” Thus, “staff should be encouraged to use their professional judgment and override the computed risk as appropriate....” Id.

The Wisconsin Supreme Court held:

Next, we address the permissible uses for a COMPAS risk assessment at sentencing. Then we set forth the limitations and cautions that a sentencing court must observe when using COMPAS.

Although it cannot be determinative, a sentencing court may use a COMPAS risk assessment as a relevant factor for such matters as: (1) diverting low-risk prison-bound offenders to a non-prison alternative; (2) assessing whether an offender can be supervised safely and effectively in the community; and (3)

imposing terms and conditions of probation, supervision, and responses to violations.

Id. at 767.

Thus, a COMPAS risk assessment may be used to “enhance a judge’s evaluation, weighing, and application of the other sentencing evidence in the formulation of an individualized sentencing program appropriate for each defendant.

Id. at 768.

Additionally, we set forth the corollary limitation that risk scores may not be used as the determinative factor in deciding whether the offender can be supervised safely and effectively in the community. This is consistent with the second “Guiding Principle” of the National Center for State Courts.

* * *

Additionally, a COMPAS risk assessment was not designed to address all of the goals of a sentence. Its aim is addressing the treatment needs of an individual and identifying the risk of recidivism. Sentencing, on the other hand, is meant to address additional purposes. *See State v. Dowdy*, 2012 WI 12, ¶ 97, 338 Wis.2d 565, 808 N.W.2d 691 (Abrahamson, C.J., dissenting)(“It is commonly understood that there are four main purposes of sentencing: (1) deterrence; (2) rehabilitation; (3) retribution; and (4) segregation.”).

Because of these disparate goals, using a risk assessment tool to determine the length and severity of a sentence is a poor fit. As scholars have observed, “[a]ssessing the risk of future crime plays no role in sentencing decisions based solely on backward-looking perceptions of blameworthiness, ... is not relevant to deterrence, ... and should not be used to sentence offenders to more time than they morally deserve.”

Thus, a sentencing court may consider a COMPAS risk assessment at sentencing subject to the following limitations. As recognized by the Department of Corrections, the PSI instructs that risk scores may not be used: (1) to determine whether an offender is incarcerated; or (2) to determine the severity of the sentence. Additionally, risk scores may not be used as the determinative factor in deciding whether an offender can be supervised safely and effectively in the community.

Importantly, a circuit court must explain the factors in addition to a COMPAS risk assessment that independently support the sentence imposed. A COMPAS risk assessment is only one of many factors that may be considered and weighed at sentencing.

Any Presentence Investigation Report (“PSI”) containing a COMPAS risk assessment filed with the court must contain a written advisement listing the limitations. Additionally, this written advisement should inform sentencing courts of the following cautions as discussed throughout this opinion:

- The proprietary nature of COMPAS has been invoked to prevent disclosure of information relating to how factors are weighed or how risk scores are determined.
- Because COMPAS risk assessment scores are based on group data, they are able to identify groups of high-risk offenders—not a particular high-risk individual.
- Some studies of COMPAS risk assessment scores have raised questions about whether they disproportionately classify minority offenders as having a higher risk of recidivism.
- A COMPAS risk assessment compares defendants to a national sample, but no cross-validation study for a Wisconsin

population has yet been completed. Risk assessment tools must be constantly monitored and re-normed for accuracy due to changing populations and subpopulations.

- COMPAS was not developed for use at sentencing, but was intended for use by the Department of Corrections in making determinations regarding treatment, supervision, and parole.

It is important to note that these are the cautions that have been identified in the present moment. For example, if a cross-validation study for a Wisconsin population is conducted, then flexibility is needed to remove this caution or explain the results of the cross-validation study. Similarly, this advisement should be regularly updated as other cautions become more or less relevant as additional data becomes available.

Loomis, 881 N.W.2d at 768-770 (footnotes omitted).² See also

Klinge, The Promises and Perils of Evidence-Based

Corrections, 91 Notre Dame L. Rev. 537, 576 (2015)(in order to remain accurate, risk assessment tools “must be constantly re-normed for changing populations and subpopulations.”).

² Pamela M. Casey et al., National Center for State Courts (NCSC), Using Offender Risk and Needs Assessment Information at Sentencing: Guidance for Courts from a National Working Group. (2011).
<http://www.ncsc.org/Services-and-Experts/~ /media/Files/PDF/Services%20and%20Experts/Areas%20of%20expertise/Sentencing%20Probation/RNA%20Guide%20Final.ashx>.

The district court considered and relied on inaccurate information which violated Gordon's right to due process. U.S. Const. amend. XIV; Iowa Const. art. I, § 9. The district court improperly considered and relied on the risk assessment (STATIC-99R and SOTIPS) scores contained in the Psychosexual Assessment Report.

"[Co]nsider" and "rely" ... are not interchangeable. "Rely" is defined as "to be dependent" or "to place full confidence." Webster's New Collegiate Dictionary 977 (1974). *** "Consider" is defined as "to observe" or to "contemplate" or to "weigh." Id. at 241-42.

State v. Loomis, 881 N.W.2d at 772 n.2 (Roggensack, J., concurring). Under the circumstances of this case, it is necessary to discuss consideration and reliance separately.

First, it was improper for the district court to consider the risk assessment scores in determining the appropriate sentence. The district court was not aware of the limitations of the risk assessment tools. The PSI did not contain any cautions or stated limitations for the use of the STATIC-99R and SOTIPS scores. (PSI, p. 10)(Conf. App. p. 46). While the

Psychosexual Assessment Report contains some caveats, these are not sufficient to place the district court on notice of the risk assessment tools' proper focus. The Report stated Gordon was provided with notice of the purpose of the interview and the methods used. (Report p. 1 (Informed Consent))(Conf. App. p. 50). But the district court was not provided with this same information.

The Report provided that the STATIC-99R is designed to *“assist in the prediction of sexual and violent recidivism for sexual offenders.”* And *“these estimates do not directly correspond to the recidivism risk of an individual offender.”* (Report p. 9-10)(Conf. App. pp. 58-59). The SOTIPS is *“designed to aid in assessing risk, treatment, and supervision needs, and progress among adult male sex offenders.”* (Report p. 10)(Conf. App. p. 59). The SOTIPS advisement did not provide that the score does not relate to an individual offender.

See Sex Offender Treatment Intervention and Progress Scale (SOTIPS) Manual.

<http://www.csom.org/pubs/SOTIPSMANUALOctober2013.pdf>.

The last caveat was the “*report was prepared expressly for use by the Second Judicial District Court Department of Correctional Services.*” (Report p. 11)(Conf. App. p 60).

The district court was not provided with sufficient cautions for and limitations of the risk assessment tools to allow the court to consider the results. The PSI and the Psychosexual Assessment Report must be required to specifically inform the sentencing court of the limitations of the assessment tools. Cf. Loomis, 881 N.W.2d 769-70. The record does not specifically demonstrate the limitations. However, at a minimum, the written advisement should include: (1) the risk assessment scores are based on group data and not specific to this individual defendant; (2) the existence of validation studies, including any cross-validation for an Iowa population; (3) the extent of the disclosure of the information used to determine the score such as question and answers with the formulas used; and (4) the purpose of the

tool and that the risk assessment tools were not developed for use at sentencing.³ Without sufficient cautions and limitations provided, the consideration of the STATIC-99R and SOTIPS scores violated Gordon's due process rights.

Additionally, the reliance on the risk assessment scores violated Gordon's due process rights. As the Wisconsin Court in Loomis determined, the sentencing court cannot use the scores to: (1) to determine whether an offender is incarcerated; or (2) to determine the severity of the sentence. Loomis, 881 N.W.2d at 769. The district court improperly relied on the risk assessment scores to determine Gordon should be incarcerated. (Sent. Tr. p. 16L3-p. 17L1).

³ An advisement of the purpose and use of the risk assessment tools is important for the sentencing court to understand as shown by the record in the present case. The sentencing court believed SOTIPS was supposed to tell the court Gordon's supervision needs and what progress can be anticipated through treatment. (Sent. Tr. p. 16L10-16). SOTIPS is not predictive of treatment success, but a measure of progress. See Sex Offender Treatment Intervention and Progress Scale (SOTIPS) Manual. <http://www.csom.org/pubs/SOTIPSMANUALOctober2013.pdf>.

The consideration and reliance on the STATIC-99R and SOTIPS risk assessment score violated Gordon's right to due process. Gordon requests this Court adopt guidelines for use of actuarial risk assessment tools in sentencing proceedings which is consistent with due process guaranteed by the United States Constitution and the Constitution of the State of Iowa. U.S. Const. amend. XIV; Iowa Const. art. I, § 9. Gordon must be granted a new sentencing hearing where a corrected Presentence Investigation Report can be considered. Only with correct information regarding the accuracy of the risk assessment and the purpose of such tools, along with sufficient written cautions and limitation, can Gordon's right to due process be protected during the sentencing proceeding.

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN RELYING ON IMPERMISSIBLE FACTORS IN IMPOSING SENTENCE.

Standard of Review.

The standard of appellate review is for errors of law. Iowa R. App. P. 6.907. The scope of review for defects in the

district court's sentencing procedure is for an abuse of discretion. State v. Millsap, 547 N.W.2d 8, 10 (Iowa Ct. App. 1996). A sentence imposed in accordance with applicable statutes will be overturned only for an abuse of discretion or a defect in the sentencing procedure. State v. Wright, 340 N.W.2d 590, 592 (Iowa 1983).

Preservation of Error.

The general rule of error preservation is not applicable to void, illegal or procedurally defective sentences. State v. Thomas, 520 N.W.2d at 313.

Discussion.

In exercising its discretion, the district court is to weigh all pertinent matters in determining a proper sentence including the nature of the offense, the attending circumstances, the defendant's age, character, and propensities or chances of reform. State v. Loyd, 530 N.W.2d 708, 713 (Iowa 1995). A court may not consider an unproven or unprosecuted offense when sentencing a defendant unless

(1) the facts before the court show the accused committed the offense, or (2) the defendant admits it. State v. Witham, 583 N.W.2d 677, 678 (Iowa 1998). This Court has recognized that when a challenge is made to a criminal sentence on the basis that the court improperly considered unproven criminal activity, the issue presented is simply one of the sufficiency of the record to establish the matters relied upon. State v. Longo, 608 N.W.2d 471, 474 (Iowa 2000).

A district court's sentencing decision enjoys a strong presumption in its favor. State v. Peters, 525 N.W.2d 854, 859 (Iowa 1994). To overcome the presumption, a defendant must affirmatively show that the district court relied on improper evidence such as unproven offenses. State v. Sailer, 587 N.W.2d 756, 762 (Iowa 1998).

Defense counsel did not initially object to the use of the PSI, with exception to the recommendation Gordon be held in jail pending placement at the residential correctional facility. (Sent. Tr. p. 2L12-22). However, after the prosecutor

referenced a pending charge in another county, defense counsel requested the court not consider the pending charge. (Sent. Tr. p. 3L15-25, p. 7L7-14). The court indicated that the pending charge was part of the PSI which defense counsel said the court could consider for sentencing purposes. (Sent. Tr. p. 11L6-8, p. 12L8-17). Because the court ruled the pending charge and the information related to it were appropriate for consideration, Gordon was forced to discuss this incident in an attempt to provide information about his account. Gordon denied knowledge of the person's age and her status as a runaway. (Sent. Tr. p. 12L20-p. 13L20).

A defendant's record of arrests - as distinct from a record of convictions - is clearly not a proper factor to be considered in sentencing. State v. Barker, 476 N.W.2d 624, 627 (Iowa Ct. App. 1991)(sentencing court legally should not have considered the defendant's record of arrests without convictions and abused its discretion in doing so). To overcome the presumption that a sentencing court properly

exercised its discretion, a defendant must affirmatively show the judge relied on an improper factor, mere awareness of the factor is not enough for reversal. State v. Ashley, 462 N.W.2d 279, 282 (Iowa 1990).

In imposing sentence, the district court relied on the pending charge and the alleged circumstances surrounding it.

The court stated:

I also have concerns about the continued high-risk behavior being in -- being with a juvenile female who obviously has got other issues going on, and a possession of methamphetamine floating around there also. I get that it's not a conviction, and I distinguish that, and I understand that, but I look at a person's behavior after they've been charged with something like this and if that's a wake-up call to them.

(Sent. Tr. p. 15L14-21). This is not a situation where the court was just aware of the pending charge and allegations Gordon aided a teenaged runaway, the court actually relied on it to impose a prison term.

When a court in determining a sentence uses any improper consideration, re-sentencing of the defendant is required. State v. Gonzales, 582 N.W.2d 515, 517 (Iowa

1998); State v. Black, 324 N.W.2d 313, 315 (Iowa 1982); State v. Sinclair, 582 N.W.2d 762, 765 (Iowa 1998). This is true even if it is was merely a secondary consideration. See State v. Messer, 306 N.W.2d 731, 733 (Iowa 1981) (The appellate court cannot speculate about the weight trial court mentally assigned an improper factor). Gordon should be granted a new sentencing hearing at which time the unproven offense should not be mentioned or considered.

III. TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE.

Standard of Review.

Because a constitutional right is presented, the standard of review is de novo. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984).

Preservation of Error.

Claims of ineffective assistance of counsel are properly before the Court on direct appeal. State v. Kellogg, 263 N.W.2d 539, 543 (Iowa 1978). The present record is adequate

to resolve the claim on direct appeal. State v. Buck, 510 N.W.2d 850, 853 (Iowa 1994).

Discussion.

The defendant is entitled to the assistance of counsel. U.S. Const. amend. VI; U.S. Const. amend. XIV; Iowa Const. art. I, § 10. Further, the defendant is entitled to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063 (1984). The test to be applied to determine if a defendant was denied effective assistance of counsel is whether under the entire record and totality of the circumstances counsel's performance was within the normal range of competence. Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981).

When specific errors are relied upon to show the ineffectiveness of counsel, the defendant must demonstrate: 1) counsel failed to perform an essential duty; and 2) prejudice resulted therefrom. Snethen v. State, 308 N.W.2d at 14. The essential duties required of counsel cannot be set out as a list

of detailed rules and the standard to be applied to the essential duty prong is "whether counsel's assistance was reasonable considering all the circumstances." Strickland v. Washington, 466 U.S. at 686, 104 S.Ct. at 2065. Prejudice is found where there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S.Ct. at 2068.

This Court will not decide a case on a ground not raised in the district court. Devoss v. State, 648 N.W.2d 56, 60-61 (Iowa 2002). Counsel has a duty to preserve error. State v. Hrbek, 336 N.W.2d 431, 435-436 (Iowa 1983). Failure to preserve error may be so egregious that it denies a defendant the constitutional right to effective assistance of counsel. State v. Stelzer, 288 N.W.2d 557, 560 (Iowa 1980).

1. Trial counsel provided ineffective assistance by failing to object to the PSI which included the Chickasaw County pending charge and surrounding circumstances.

If defense counsel waived error regarding the consideration and reliance on the unproven pending charge and circumstances, trial counsel breached an essential duty.

The PSI contained references to the pending charge. Additionally, the recommendation of the Department of Correctional Services was based, in part, on the existence of the charge and the allegation Gordon had a teenage runaway in this vehicle at the time of his arrest. (PSI p. 3, 8, 9, 10, 12)(Conf. App. pp. 39, 44-46, 48).

In determining a defendant's sentence, a district court is free to consider portions of a presentence investigation report that are not challenged by the defendant. See State v. Witham, 583 N.W.2d 677, 678 (Iowa 1998)(court was free to consider the portions of the PSI which were not challenged by defendant); State v. Gonzalez, 582 N.W.2d 515, 517 (Iowa 1998) (court properly relied on defendant's statements in the

presentence investigation report which amounted to an admission of other criminal activity because the statements were not challenged by defendant when he was given an opportunity to do so); State v. Townsend, 238 N.W.2d 351, 358 (Iowa 1976)(finding that district court acted properly in considering the presentence investigation report because defendant left the report “unchallenged as to accuracy except in two minor particulars”). If defense counsel’s initial failure to object waived error and allowed the court to consider and rely on the unproven charge and circumstances, counsel breached an essential duty.

Gordon was prejudiced by counsel’s failure. Even after Gordon’s denial that he knew the age and status of the teenager, the sentencing court found this significant. This was one of the factors that tipped the scale to incarceration. Gordon was prejudiced and should be granted a new sentencing hearing with a different district court judge. State v. Lovell, 857 N.W.2d 241, 243 (Iowa 2014).

2. If error was not preserved in Division I, trial counsel provided ineffective assistance by failing to challenge the sentencing procedure and sentence imposed which violated Gordon's constitutional right to due process.

If error was not preserved in Division I, trial counsel breached an essential duty. Trial counsel had a duty to protect Gordon's due process rights at sentencing. Appellant recognizes the issue raised is one of first impression in Iowa. An attorney has a duty to keep abreast of developments in the law. Cf. State v. Vance, 790 N.W.2d 775, 789 (Iowa 2010) (discussing information attorney would have discovered if had researched Belton). Had counsel kept abreast with sentencing law and policy from around the country or paid some attention to pending certiorari petitions in the United States Supreme Court counsel would have been aware of the Loomis case.

http://sentencing.typepad.com/sentencing_law_and_policy/2015/09/wisconsin-appeals-court-urges-states-top-court-to-review-use-of-risk-assessment-software-at-sentenci.html;

http://sentencing.typepad.com/sentencing_law_and_policy/2016/07/wisconsin-supreme-court-rejects-due-process-challeng

[e-to-use-of-risk-assessment-instrument-at-senten.html;](http://www.scotusblog.com/case-files/cases/loomis-v-wisconsin/)
<http://www.scotusblog.com/case-files/cases/loomis-v-wisconsin/>. The Wisconsin Supreme Court decision is persuasive and provides minimal due process protection at sentencing. This argument was worth raising. State v. Westeen, 591 N.W.2d 203, 210 (Iowa 1999).

If error was not preserved, Gordon was prejudiced by counsel's failure. Appellant hereby incorporates by reference the argument outlined above. As the argument is legally meritorious, defense counsel breached an essential duty by failing to specifically make the above argument. Cf. State v. Greene, 592 N.W.2d 24, 29 (Iowa 1999) (Counsel is not incompetent for failing to pursue a meritless issue.).

If error was not preserved, Gordon was prejudiced by counsel's failure to adequately protect his due process rights at sentencing. As argued above, Gordon is entitled to a new sentencing hearing.

CONCLUSION

Sean Gordon respectfully requests this Court vacate his sentence and remand for a new sentencing hearing. Additionally, Gordon respectfully request this Court adopt guidelines for use of actuarial risk assessment instruments in sentencing proceedings.

REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was \$ 4.74, and that amount has been paid in full by the Office of the Appellate Defender.

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